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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-183

JAMES R. COSON, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents*

## REPLY TO MEMORANDUM IN OPPOSITION

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## REPLY TO MEMORANDUM IN OPPOSITION

1. Respondents' assertion that decisions in six circuits have settled the issue raised by the petition in this case is incorrect. In two circuits—the Seventh and Tenth—the law is, at minimum, uncertain. Decisions in those circuits subsequent to *Donaldson* v. *United States,* 400 U.S. 517 (1971) and *Kyriaco* v. *United States,* 400 U.S. 922 (1971) directly conflict with decisions in the Sixth and Ninth Circuits. *Compare United States* v. *Monsey,* 428 F.2d 1348 (7th Cir. 1970) and *United States* v. *Billingsley,* 469 F.2d 1208 (10th Cir. 1972) *with United States* v. *Weingarden,* 473 F.2d 454 (6th Cir. 1973) and *United States* v. *Cromer,* 483 F.2d 99 (9th Cir. 1973).[1] And, contrary to respondents' claim (Opp. 3), subsequent decisions in

[1] Decisions in the Second and Eighth Circuits were prior to *Donaldson* and *Kyriaco* and are thus of questionable vitality. *See In re Magnus, Mabee & Reynard, Inc.*, 311 F.2d 1216 (2d Cir. 1962), *cert. denied,* 373 U.S. 902 (1963); *United States* v. *Giordano,* 419 F.2d 564, 568, n.5 (8th Cir. 1969), *cert. denied,* 397 U.S. 1037 (1970) (dictum).

the Seventh and Tenth Circuits did not overrule *Monsey* and *Billingsley*.[2]

If all the pertinent decisions are considered, it cannot be said that the law is settled among the lower federal courts.[3] This Court should grant certiorari to end the conflict and confusion on the issue.[4]

2. Respondents' description (Opp. 3-4, n. 1) of the proceedings in *Kyriaco* subsequent to this Court's denial of the petition for certiorari is misleading. Counsel for *Kyriaco* in the district court has advised the undersigned that (i) most of the records were obtained by means of a *grand jury subpoena* issued shortly after the district court's refusal to enforce the administrative summons and (ii) the I.R.S. summons was not complied with until *after* the criminal cases had been disposed of.

3. Respondents' concern (Opp. 5) that taxpayer resistance to enforcement of I.R.S. summonses will

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[2] Respondents state incorrectly that there was an indictment prior to enforcement in *United States* v. *Hodgson*, 492 F.2d 1175 (10th Cir. 1974). Opp. 3. In that case, a recommendation for criminal prosecution from the Internal Revenue Service to the Department of Justice had not even occurred. *See also* Pet. 12-13.

[3] Recent decisions in the Ninth and Third Circuits further illustrate the extensive litigation and uncertainty in the federal courts on summons enforcement issues. *See United States* v. *Zack*, No. 74-2467 (9th Cir., July 16, 1975); *United States* v. *Lafko*, No. 74-2083 (3d Cir., July 31, 1975).

[4] As respondents point out, the courts below did not assess the validity of the summons in light of developments since its issuance. Opp. 4-5. If this Court denies certiorari, petitioners will seek a hearing in the district court. The lack of consideration of the issue below does not, however, warrant denial of the petition in these circumstances because the law is uncertain and the federal courts, including the courts below, need the guidance of this Court at this time.



improperly interfere with criminal investigations is misplaced. Respondents have adequate alternatives to insure that law enforcement efforts will not be thwarted. They admit that information could be obtained in this case by other means which are traditionally associated with the criminal process, such as a grand jury or trial subpoena. Opp. 5, n. 3. And, indeed, that course was followed in *Kyriaco*. Petitioners do not suggest that the Government should be barred from obtaining information for criminal prosecution simply because prosecution has been recommended. The point is simply that the Government should be required to follow procedures which have been established for prosecuting a criminal case, and not be permitted to employ civil process to that end.

For the reasons set forth above and in the petition, the Court should issue a writ of certiorari to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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